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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE CUEVAS MENDOZA,

Defendant and Appellant.

D043960

(Super. Ct. No. CF12231)

APPEAL from a judgment of the Superior Court of Imperial County, Barrett J. Foerster, Judge. Affirmed.

Jorge Cuevas Mendoza entered a no contest plea (*People v. West* (1970) 3 Cal.3d 595) to first degree burglary. (Pen. Code, § 459.) At the sentencing hearing, Mendoza requested the appointment of new counsel, claiming his current attorney had "coerced him" into pleading guilty and he wanted substitute counsel to investigate filing a motion to withdraw the no contest plea. The court denied the request. Pursuant to a plea agreement, the court sentenced Mendoza to prison for the four-year middle term,

suspended execution of sentence, and placed him on three years' probation including a condition he serve 365 days in custody. After sentencing Mendoza, the court appointed new counsel to represent him. Mendoza contends the trial court erred in denying his motion to substitute counsel.¹

DISCUSSION

The People argue that Mendoza waived his right to appeal the plea bargain and that he cannot challenge on appeal the validity of a no contest plea absent a certificate of probable cause. Neither argument has merit here.

The plea agreement Mendoza signed includes the provision, "I understand that I have the right to appeal any adverse decision and I give up that right." However, a general waiver of the right to appeal does not include waiver of unforeseen future errors. (*People v. Sherrick* (1993) 19 Cal.App.4th 657, 659; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.)

Penal Code section 1237.5 provides that absent a certificate of probable cause, a defendant cannot challenge the validity of a guilty plea on appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095.) Because Mendoza is challenging denial of his request for appointment of replacement counsel to investigate a motion to withdraw the guilty plea, not the guilty plea itself, Penal Code section 1237.5 does not apply. However, considering the merits, we affirm.

¹ Because Mendoza entered a no contest/guilty plea, he cannot challenge the facts underlying the conviction. (Pen. Code, § 1237.5; *People v. Martin* (1973) 9 Cal.3d 687, 693.) We need not recite the facts.

A defendant is entitled to competent counsel at all stages of a criminal proceeding, and thus a trial court should appoint independent counsel to examine the merits of a motion to withdraw a guilty plea the defendant claims is based on his trial counsel's inadequate representation. (*People v. Smith* (1993) 6 Cal.4th 684, 695.) Here, the trial court did not appoint independent counsel to look into a motion to withdraw the guilty plea until after it sentenced Mendoza. This was error. The question is whether holding the sentencing hearing before appointing counsel to look into the possibility of filing a motion to withdraw the guilty plea was reversible error.

Defendants have a constitutional right to effective counsel in criminal cases. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) The burden is on the defendant to prove he received ineffective assistance of counsel. To do so, the defendant must show counsel failed to act in a manner to be expected of a reasonably competent attorney and that counsel's acts or omissions prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.) The record does not reflect what ultimately happened on the potential motion to withdraw the guilty plea. In reviewing a judgment, we are limited to the record before us. (*People v. Green* (1979) 95 Cal.App.3d 991, 1001.) Absent contrary evidence, we assume new counsel investigated the viability and wisdom of a motion to withdraw the guilty plea and Mendoza chose not to pursue the potential motion. In any case, nothing in the record indicates Mendoza suffered prejudice in the investigation of the motion to withdraw the guilty plea.

Even if we assume that because of a conflict of interest, Mendoza's initial counsel, who represented him at the sentencing hearing, did not provide competent assistance,

there is nothing in this record to suggest Mendoza suffered any prejudice. The court followed the plea bargain in staying execution of the prison term and placing Mendoza on three years' probation on the condition he serve 365 days in custody. The fact the court sentenced Mendoza before independent counsel considered the filing of a motion to withdraw the no contest plea did not prejudice him. Absent prejudice, any error in proceeding with the sentencing hearing before appointing independent counsel to look into a motion to withdraw the guilty plea was not reversible.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.